

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING**

77-1435

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
:
UNITED STATES OF AMERICA,
:

Appellee,
:

Docket No. 77-1435

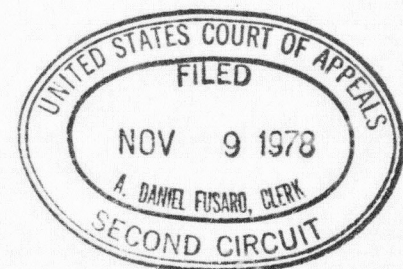
-against-
:

LAVANNE ELAINE HAMMOND and
MILLCENT JONES,
:

Appellants. :
-----X

PETITION OF LAVANNE ELAINE HAMMOND
FOR REHEARING

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PETITION OF LAVANNE ELAINE HAMMOND
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PRELIMINARY STATEMENT

Lavanne Elaine Hammond respectfully petitions for rehearing of the opinion of a panel of this Court (Meskill, C. J., Dumbald and Port D.J.J.) affirming her conviction Docket No. 77-1435, slip op. 1208 (September 28, 1978).

The above-captioned appeal was argued on July 20, 1978. On September 28, 1978 this Court filed an opinion affirming the conviction of Hammond of conspiracy to possess heroin with intent to distribute and conspiring to distribute heroin in violation of 21 U.S.C. § 846.

REASONS FOR THIS PETITION

Appellant respectfully submits this petition for rehearing because the panel has overlooked the thrust of appellant's argument with regard to certain of the evidence introduced against her. She contends that the drug paraphernalia acquired as a result of a search of her home for a third party for whom the agents of the Drug Enforcement Administration had an arrest warrant, was erroneously introduced in evidence.

The panel devoted a substantial portion of its opinion to the question of whether "an arrest warrant may be all that is required for law enforcement officers to enter a private residence or to search that residence for purposes of arresting the subject of the warrant." (footnote 1.p. 4843). This proposition appellant assumed arguendo. However, she contended that the evidence acquired incident to that search, which was unsuccessful, could not properly be introduced against her. The panel, however, overlooked the issue appellant raised. It held, without discussion except the citation of Coolidge v. New Hampshire, 403 U.S. 443, 464-71 (1971) and United States v. Berenguer, 562 F.2d 206, 210 (2d Cir. 1977), that such evidence may be so introduced. Those cases do not support such a holding.

ARGUMENT

POINT I

EVIDENCE SEIZED DURING A SEARCH INCIDENT
TO AN UNSUCCESSFUL ATTEMPT TO EXECUTE AN ARREST
WARRANT MAY NOT BE INTRODUCED AGAINST A PERSON
NOT THE SUBJECT OF THE WARRANT WHO WAS RESIDING
IN THE HOME IN WHICH THE SEARCH WAS MADE

The evidence is clear that the DEA agents entered appellant's home to arrest a fugitive, Hansen. They searched her home thoroughly on two separate occasions, hours apart, in an unsuccessful attempt to find him. While they did not find him, they did find drug paraphernalia, supposedly in "plain view" during the second search. It was located in a room in which appellant was not present, she having already been arrested and removed to a government facility. This evidence was introduced against her and undoubtedly contributed to her conviction.

The panel, in passing, stated that two decisions, Coolidge v. New Hampshire, 403 U.S. 443 (1971) and United States v. Berenguer, 562 F.2d 206 (2d Cir. 1977) indicate that introduction of such evidence was not error. Upon analysis, they support a contrary holding. In Coolidge, the search conducted by the state was held to be illegal despite an attempt to justify it under the "plain view" doctrine. The Court in describing that doctrine stated that "an object that comes into view during a search incident to arrest that is appropriately limited in scope under existing law may be seized without a warrant," citing, Chimel v. California, 395 U.S. 752 (1969). But in Chimel the Court

only held (395 U.S. at 763) that there was "ample justification... for a search of the arrestee's person and the area 'within his immediate control' - construing that phrase to mean the area from which he might gain possession of a weapon or destructable evidence." As Hansen was not found and Hammond was arrested in her kitchen, far removed from the location of the evidence and indeed was not even in her house when the evidence was discovered, Coolidge does not support the conclusion that evidence found in the second extensive search for Hansen could properly be introduced against Hammond.

An analysis of Coolidge aside from its reliance upon Chimel further indicates that the "plain view" doctrine should not be applied in this case. The Court in Coolidge rejected three separate arguments that the search conducted there was valid. After holding the search warrant obtained invalid, it held a search of an area outside the possession or under the control of the person validly arrested to be illegal. The same rule should be applied here. The drug paraphernalia was outside Hammond's possession or control and since the fugitive Hansen was not found, outside his also. The second argument advanced in Coolidge is applicable to searches of automobiles and is not pertinent here.

The third argument concerned the "plain view" exception to the warrant requirement. In rejecting the state's argument, the Court discussed the nature of the exception (403 U.S. at 466): "What the 'plain view' cases have in common is that the police

officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." However, the Court recognized that searches carried out in a person's house impose strict requirements of compliance with the Fourth Amendment. And under its analysis those requirements were not met in this case.

The Court states (403 U.S. at 476) that Trupiano v. United States, 334 U.S. 699 (1948) holds that "no searches and seizures could be legitimated by the mere fact of valid entry for purpose of arrest, so long as there was no showing of special difficulties in obtaining a warrant for search and seizure." The Court then discussed criticism that Trupiano is too restrictive. Nevertheless it accepted its reasoning - "If the Fourth Amendment requires a warrant to enter and seize the person, then it makes sense as well to require a warrant to seize other items that may be on the premises." (443 U.S. at 477). This reasoning would invalidate the search in this case as there certainly were no "special difficulties" in obtaining a warrant. The only further analysis required is whether the evidence seized could be introduced as validly seized incident to arrest under Chimel. As it was not in the possession or control of Hammond or Hansen, it clearly does not meet that test.

Berenguer, supra, involved a warrantless arrest where the "plain view" doctrine was held inapplicable because the evidence found was not in "plain view." While the Second Circuit restates the requirements of the doctrine, it is distinguishable. The

evidence was found in the area within the immediate control of the person arrested. And the evidence was introduced against him. That is simply not the situation here.

The decision in Chimel limits the area of search. Even assuming the right of the agents to enter Hammond's home to search for Hansen (provided they had probable cause to believe he was there and a warrant for his arrest), a right appellant does not concede and the Court must determine to exist, Chimel limits the area which may be searched to that within Hammond's or Hansen's immediate control. Since the drug paraphernalia was not seized in such an area, to allow it to be introduced into evidence against Hammond extends far beyond anything permitted by Chimel and invites a plethora of abuses of a person's right to be secure in his home, a right this Court has eloquently stated in United States v. Reed, 572 F.2d 412 (2d Cir. 1978).

CONCLUSION

The petition for rehearing should be granted and the judgment of conviction reversed.

Respectfully submitted,

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